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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 107.

MARY BOYD EVANS, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

No. 108.

KATHARINE BOYD MORRHEAD, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONER[1].

Respondent's brief in opposition to the petition is hardly candid.

It begins by saying:

> "The facts as found by the Board of Tax Appeals (R. 8-13) may be summarized as follows:—"

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[1] As in our original brief, for simplicity we will speak in the singular as if only one case were here.

and continues with a summary of the Board's findings, until it comes to the most crucial one. The Board's finding (R. 10) was:

> "Each trust is irrevocable."

But respondent's brief says:

> "Each trust purports to be irrevocable"

and adds a footnote:

> "The court below sustained our contention that the trusts were revocable in fact and in law even though they contained no express provision for revocation."

Since a principal issue here is the right of the Circuit Court of Appeals to set aside findings of fact, we submit that the respondent's brief should not have used this language as part of a summary of the *Board's* findings.

Respondent's brief (p. 3) begins by recognizing that, as a fact, at no time was the income of petitioner insufficient for the support and benefit of petitioner. This fits exactly with the Board's finding (R. 12). In other words, the contingency which might render the trust in small part revocable, never occurred. Nevertheless respondent's brief attempts to justify a conclusion that the trust was at all times wholly revocable.

On pages 10-11, respondent's brief says the decision below is in harmony with the decision in *Wenger* v. *Commissioner* (127 F. (2d) 523). But it neglects to point out that in the *Wenger* case the Circuit Court of Appeals accepted the Board's findings and affirmed, while here the court below departed from the Board's findings and reversed. The Board, in its opinion in this case (R. 15) distinguished the *Wenger* case *on the facts.*

Respondent's brief (p. 11) says:

> "The mother had only a defeasible life interest in the Journal stock."

She had much more than that—if she did not remarry, her interest in *all* the stock continued throughout her life. If she had remarried, she would have taken a full fee ownership in one-third of the property which had not then been disposed of (R. 50-51). The power of disposition in Mrs. Boyd (see last paragraph on p. 50 of the record) was so broad that her ownership was obviously much broader than a defeasible life estate.

The respondent's brief (p. 11) in effect argues that since the daughter gave "at least some consideration" for the conveyance by the mother, other than the agreement to create the trust, the daughter was not bound by the agreement to create the trust. The consideration surrendered by the daughter was a reversion in some minor assets, worth $1,980.66 at the outside. The life estate in the Journal stock, which she acquired subject to agreement to create the trust, was worth $175,610.40.[1]

If A were creating a trust and wished to avoid taxation under section 167, so he "sold" his assets to B (a beneficiary of the proposed trust) for a nominal consideration, and B executed the trust indenture—respondent would be the last to admit that the nominal consideration would render A any the less the real grantor of the trust.

It is obvious that Mrs. Boyd was in a position to insist that the trust she had drafted be executed or else that she get her property back—she having given the property only on condition that the trust be created—so respondent's brief certainly is wrong in saying (p. 11):

> "The record affords no adequate basis for the contention that the taxpayers were merely conduits employed by the mother in setting up the trusts."

So far as the trusts covered Mrs. Boyd's interest in the property, that is exactly what they were.

And in any event whether they were or not is a question of fact which the Board, not the Circuit Court of Appeals, should decide.

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[1] For sources of these figures see Appendix, p. 7 hereof.

The effort in respondent's brief (p. 12) to distinguish *Buhl* v. *Kavanagh* (118 F. (2d) 315), is based upon evasion of the announced principle upon which that case was decided by quibbling with words.

In the *Buhl* case.	In our case.
the father had previously created a trust, but retained such control as to be regarded in law as still the owner.	the mother was the owner of the life estate.
He agreed to vest the corpus in the daughter	She agreed to vest the life estate in the daughter
by the process of terminating the trust	by the instrument of November 2, 1931
on condition that a new trust	on condition that a trust
prepared by him be executed by the daughter.	prepared by her be executed by the daughter.
The Circuit Court of Appeals held the father to be the grantor of the new trust.	The Circuit Court of Appeals held the mother *not* to be the grantor of the trust.

Respondent's brief (p. 12) disposes of the conflicts with *Lehman* v. *Commissioner*, 109 F. (2d) 99, and *Commissioner* v. *Warner*, 127 F. (2d) 913, by the mere *ipse dixit* that there is no conflict because those cases involved reciprocal trusts. If those cases were correctly decided (the Commissioner won in both) then *a fortiori* the court below erred in the case at bar.

In those cases	In this case
A, by giving B *equivalent consideration*, induced B to create a trust of property theretofore owned by B.	A, by giving B *the very subject of the trust*, induced B to create a trust of property theretofore owned by A.
A was held to be in effect the grantor of such trusts.	*A fortiori* A should be held the grantor of the trust.

Similarly respondent's brief (p. 13) disposes of the conflict with *Wilmington Trust Co.* v. *Helvering*, .. U. S. .. (No. 775, 1941 term) by merely saying that "it presents a situation which is entirely different from the one at bar".

Apparently respondent's counsel was afraid to analyze this decision as he was afraid to analyze the others we have covered above.

In that case	In this case
the Board of Tax Appeals found that certain sales although treated on taxpayer's books as short sales were in fact long transactions.	the Board of Tax Appeals found that a contingency had not occurred.
The Circuit Court of Appeals for the Third Circuit reversed on the ground that as a matter of law the transactions were not short sales.	The Circuit Court of Appeals for the Third Circuit reversed on the ground that as a matter of law the contingency was entirely at the taxpayer's will.
The Supreme Court reversed the Circuit Court of Appeals on authority of *Helvering* v. *F. & R. Lazarus & Co.*, 308 U. S. 252.	A writ of certiorari should be allowed on the same authority.
In the *Lazarus* case	In this case
"The Board *in substance* found that the instrument under which the taxpayer purported to convey legal ownership to the trustee bank was in reality given and accepted as no more than security for a loan; * * *.	The Board *in substance* found that the intention of the grantor of the trust was to provide for invasion of corpus of the trust in the event of a real need which had not occurred.
These findings are supported by evidence." [308 U. S. at 254]	The finding is supported by evidence. [See brief annexed to petition, pp. 16-17]

The Circuit Court of Appeals made its own interpretation of the effect of the documents executed.	The Circuit Court of Appeals put its own interpretation on words showing the intent of the trust instrument.
The Supreme Court restored the Board's conclusion.	A writ should be allowed.

Respondent's brief (p. 13) says that the argument on pages 18-20 of the brief annexed to the petition "is at variance with the plain provisions of the trust instrument". Since that argument involved quotation of the very words of the trust instrument, we submit that respondent should have at least indicated the nature of the alleged variance.

It is respectfully submitted that a writ of certiorari should be granted.

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